UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	)	
v.	)	CR. No. 10-184-1 S
JASON WAYNE PLEAU,	)	
Defendant.	)	

OPINION AND ORDER

WILLIAM E. SMITH, United States District Judge.

Before the Court are Defendant Jason Pleau's Motion to Dismiss the Capital Aspects of the Indictment (ECF No. 164) and his Motion to Strike Aggravating Factors or in the Alternative for Other Relief (ECF No. 209). For the reasons set forth below, Pleau's motion to dismiss is DENIED, and his motion to strike is GRANTED in part and DENIED in part.

I. Background

On December 14, 2010, Pleau was indicted and charged with: (1) conspiracy to commit robbery affecting commerce, 18 U.S.C. § 1951(a); (2) robbery affecting commerce, id.; and (3) using, carrying, possessing, and discharging a firearm during and in relation to a crime of violence, death resulting, § 924(c)(1)(A) and (j)(1). (ECF No. 13.) These charges stem from the September 20, 2010 robbery and fatal shooting of David Main. The government subsequently filed its Notice of Intention to

Seek the Death Penalty as to Defendant Jason W. Pleau ("notice of intent"). (ECF No. 120.)

In order for a defendant to be "death eligible" under the Federal Death Penalty Act ("FDPA"), the sentencing jury, if it convicts the defendant of the crime alleged, must find that he acted with at least one of the required mental states set out in 18 U.S.C. § 3591(a)(2)(A)-(D). Jones v. United States, 527 U.S. 373, 376 (1999). Additionally, the jury must find the existence of at least one of the aggravating factors listed in 18 U.S.C. § 3592(c) ("statutory aggravating factors"). Jones, 527 U.S. at 376-77. Once these threshold requirements are met, the jury has to decide whether to impose a death sentence by weighing the aggravating factors against the mitigating factors. Id. at 377. In making this determination, the jury may consider aggravating factors other than those expressly provided for by statute ("non-statutory aggravating factors"), so long as they were included in the government's notice of intent. See 18 U.S.C. § 3592(c).

Here, in a section of the indictment entitled "Notice of Special Findings," the grand jury found that, as to Count Three, Pleau acted with the four mental states enumerated in 18 U.S.C. § 3591(a)(2)(A)-(D). It also found two statutory aggravating

factors,[1] namely that Pleau: (1) knowingly created a grave risk of death to one or more persons in addition to the victim of the offense, § 3592(c)(5), and (2) committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value, § 3592(c)(8).

In its June 18, 2012 notice of intent, the government proposes to prove these same two statutory aggravating factors beyond a reasonable doubt. The notice further includes three non-statutory aggravating factors, namely: (1) victim impact evidence; (2) participation in other serious acts of violence; and (3) future dangerousness.

II. Discussion

A. Motion to Dismiss

In his motion to dismiss, Pleau contends that: (1) the federal death penalty is unconstitutional because it is rarely sought and imposed; (2) the federal death penalty is unconstitutional because there is no principled basis for distinguishing between cases in which it is imposed and those in which it is not imposed; (3) the federal death penalty is unconstitutional because it is sought and imposed on the bases of race and geography; (4) the Supreme Court's decision in Ring

[1] The grand jury actually found three statutory aggravating factors, but one of those aggravators was abandoned when the government failed to include it in the notice of intent to seek the death penalty.

v. Arizona, 536 U.S. 584 (2002), has rendered the FDPA unconstitutional; (5) the indictment in this case violates the Fifth Amendment; (6) the FDPA is unconstitutional because it fails to provide a structure which permits jurors to make a reasoned choice between death and life imprisonment; (7) the federal death penalty is unconstitutional in light of evidence that its continued enforcement will lead to the execution of innocent people; (8) the imposition of the federal death penalty in this case would be unconstitutional because the state of Rhode Island has rejected capital punishment; and (9) the death penalty is unconstitutional in all cases.

Pleau's first, second, fourth, seventh, and ninth arguments have been squarely rejected by the First Circuit and, accordingly, do not merit further discussion. See United States v. Sampson, 486 F.3d 13, 20-25, 27-29 (1st Cir. 2007).

Pleau's third claim also fails because, under Sampson, statistical evidence of racial and geographic disparities is not sufficient to establish a constitutional violation. See id. at 25-27. Such evidence is also insufficient to make out a violation of 18 U.S.C. § 3593(f), see Sampson, 486 F.3d at 25 n.4, or to justify an exercise of the Court's supervisory powers, see id.; United States v. Johnson, No. 05-CR-80337, 2009 WL 1856240, at *7 (E.D. Mich. June 29, 2009); United States v. Barnes, 532 F. Supp. 2d 625, 636 (S.D.N.Y. 2008). Finally,

evidence of statistical disparity does not entitle Pleau to discovery on his selective prosecution claim, see United States v. Bass, 536 U.S. 862, 863-64 (2002), or an evidentiary hearing, see United States v. Webster, 162 F.3d 308, 334 (5th Cir. 1998); Johnson, 2009 WL 1856240, at *5-6; Barnes, 532 F. Supp. 2d at 636-37.

Pleau's Fifth Amendment Grand Jury Clause arguments fare no better. Several federal district courts have held that the grand jury need not be informed that its "special findings" may subject the defendant to the death penalty. See, e.g., United States v. Johnson, No. CR 01-3046-MWB, 2012 WL 5275491, at *5-6 (N.D. Iowa Oct. 25, 2012); United States v. Jacques, No. 2:08-Cr-117, 2011 WL 1675417, at *10 (D. Vt. May 4, 2011), vacated on other grounds, 684 F.3d 324 (2d Cir. 2012); United States v. Haynes, 269 F. Supp. 2d 970, 981 (W.D. Tenn. 2003). Similarly, federal courts of appeals are in agreement that non-statutory aggravating factors are not required to be alleged in the indictment. See United States v. Fell, 531 F.3d 197, 237-38 (2d Cir. 2008); United States v. Mitchell, 502 F.3d 931, 979 (9th Cir. 2007); United States v. Brown, 441 F.3d 1330, 1368 (11th Cir. 2006); United States v. Purkey, 428 F.3d 738, 749-50 (8th Cir. 2005); United States v. Bourgeois, 423 F.3d 501, 507-08 (5th Cir. 2005); United States v. Higgs, 353 F.3d 281, 298-99

(4th Cir. 2003).[2] The grand jury also was not required to find that the aggravating factors outweigh the mitigating factors sufficiently to justify a death sentence. See, e.g., Purkey, 428 F.3d at 750; Jacques, 2011 WL 1675417, at *11. This proposition finds support in Sampson, where the First Circuit rejected the defendant's argument that the balancing of aggravating and mitigating factors is a fact that must be found by the jury beyond a reasonable doubt. The court explained that "the requisite weighing constitutes a process, not a fact to be

[2] Pleau attempts to counter this authority by relying on United States v. Green, 372 F. Supp. 2d 168, 174 (D. Mass. 2005), where the district court held that certain non-statutory aggravating factors, namely "prior unadjudicated crimes," must be presented to the grand jury. Green, however, is unpersuasive to the extent that it is inconsistent with the decisions of several federal courts of appeals. Indeed, federal district courts have explicitly declined to follow Green. See United States v. Jacques, No. 2:08-Cr-117, 2011 WL 1675417, at *10 (D. Vt. May 4, 2011), vacated on other grounds, 684 F.3d 324 (2d Cir. 2012); United States v. Troya, No. 06-80171-Cr, 2008 WL 4327004, at *8-9 (S.D. Fla. Sept. 22, 2008), report and recommendation adopted sub nom. United States v. Varela, No. 06-80171-CR, 2008 WL 5109257 (S.D. Fla. Nov. 21, 2008); United States v. Diaz, No. CR 05-00167 WHA, 2007 WL 656831, at *3 n.1 (N.D. Cal. Feb. 28, 2007). Pleau also cites United States v. Mills, 446 F. Supp. 2d 1115 (C.D. Cal. 2006). In that case, the district court, relying on Green, held that the Confrontation Clause applies to proof of non-statutory aggravating factors at the sentencing phase. Id. at 1135. Pleau argues that the court's reasoning suggests non-statutory aggravating factors must be charged in the indictment. However, to the extent Mills does stand for this proposition, it conflicts with the clear consensus of federal courts of appeals and, thus, is no more persuasive than Green.

found." Sampson, 486 F.3d at 32 (citing Purkey, 428 F.3d at 750).

Pleau's claim that the Court's penalty phase instructions will necessarily be incomprehensible to jurors is premature at this point in the litigation. See, e.g., Jacques, 2011 WL 1675417, at *12; United States v. Llera Plaza, 179 F. Supp. 2d 444, 449-50 (E.D. Pa. 2001). Moreover, the First Circuit has strongly implied that it is possible to craft FDPA instructions that comply with the Constitution. See Sampson, 486 F.3d at 32.

Finally, contrary to Pleau's contentions, district courts have held that the federal death penalty may be constitutionally imposed in states that do not authorize capital punishment. See, e.g., Johnson, 2012 WL 5275491, at *9-11; Jacques, 2011 WL 1675417, at *15-16; United States v. Jacques, No. 2:08-CR-117, 2011 WL 3881033, at *2-6 (D. Vt. Sept. 2, 2011) (denying the defendant's motion for reconsideration).

B. Motion to Strike

Federal courts have repeatedly upheld the statutory and non-statutory aggravating factors alleged by the government in this case. For this reason, the Court denies Pleau's request to strike each of these factors from the notice of intent.

1. Grave risk of death

Two federal courts of appeals have held that the grave risk of death statutory aggravator is not unconstitutionally vague.

See United States v. Allen, 247 F.3d 741, 786-87 (8th Cir. 2001) (grave risk of death defined as "a significant and considerable possibility under the circumstances that existed at that time that another person could be killed"), vacated on other grounds, 536 U.S. 953 (2002); United States v. Barnette, 211 F.3d 803, 819 (4th Cir. 2000) (grave risk of death defined as "a significant and considerable possibility" and as placing others in a "zone of danger").[3] Here, the government alleges that Pleau discharged a firearm between four and six times in a public place with several people nearby. If proved, these allegations are sufficient to support a finding that Pleau created a grave risk of death to others. See United States v. Robinson, 367 F.3d 278, 289 (5th Cir. 2004) (holding that no rational grand jury could have failed to find probable cause to support this factor where the defendant fired several shots "in a residential neighborhood in close proximity to at least two adolescent eyewitnesses playing on a nearby porch, and across the street from a barbecue attended by at least ten people"); United States v. Diaz, No. CR 05-00167 WHA, 2007 WL 2349286, at *4 (N.D. Cal. Aug. 14, 2007) (finding sufficient evidence to support this

[3] Pleau contends that the grave risk of death aggravating factor requires a "probability," not a mere "possibility," that another person might be killed. However, the source cited by Pleau in support of this proposition defines "grave risk of death" as "a significant and considerable possibility." 1 Leonard Sand et al., Modern Federal Jury Instructions – Criminal § 9A.03 (Instruction 9A-10) (2012) (emphasis added).

factor where the government alleged that the defendant "shot a firearm in close proximity to civilians and public-housing units").

2. Pecuniary gain

Similarly, several federal courts of appeals have rejected Pleau's argument that the FDPA's pecuniary gain aggravating factor applies only to "murder-for-hire" situations. See United States v. Bolden, 545 F.3d 609, 615 (8th Cir. 2008); Mitchell, 502 F.3d at 975; Brown, 441 F.3d at 1370. The scope of this aggravator is not, however, broad enough to encompass all murders committed during the course of a robbery. Rather, the pecuniary gain must be "expected to follow as a direct result of the murder," not the underlying robbery. Bolden, 545 F.3d at 615 (internal quotation marks omitted) (emphasis added); see also Brown, 441 F.3d at 1370; United States v. Bernard, 299 F.3d 467, 483-84 (5th Cir. 2002); United States v. Chanthadara, 230 F.3d 1237, 1263-64 (10th Cir. 2000). Interpreted in this manner, the pecuniary gain factor performs its constitutionally-required narrowing function. See Mitchell, 502 F.3d at 974-75. Finally, Pleau's contention that this aggravator fails to "reasonably justify" imposition of the death penalty is unpersuasive. See Zant v. Stephens, 462 U.S. 862, 877 (1983). It was rational for Congress to conclude that killings motivated by pecuniary gain are more culpable than other murders. See

Woratzeck v. Stewart, 97 F.3d 329, 335 (9th Cir. 1996) ("The State of Arizona could rationally conclude that a defendant's motive to murder [for pecuniary gain] more accurately reflects his relative culpability than whether the murder is done with an affirmative intent to kill or 'merely' an utter disregard for whether the victim lives or dies."); United States v. Davis, 912 F. Supp. 938, 944 (E.D. La. 1996) (holding that commission of the offense for pecuniary gain "unquestionably establish[ed] the killing as more culpable than a spontaneous murder for no pecuniary exchange").

3. Victim impact evidence

The government's first non-statutory aggravating factor is victim impact evidence. The FDPA explicitly provides for the admissibility of such evidence at the sentencing phase. See 18 U.S.C. § 3593(a). Moreover, the Supreme Court has held that the Eighth Amendment is not a "per se bar" to the admission of victim impact evidence in a capital sentencing proceeding. Payne v. Tennessee, 501 U.S. 808, 827 (1991); see also Jones, 527 U.S. at 401-02 (plurality) (rejecting the argument that a victim impact aggravating factor was unconstitutionally overbroad). The FDPA does not limit the scope of permissible victim impact evidence to the effect of the offense on the victim's immediate family members. See Jacques, 2011 WL 1675417, at *28. Indeed, federal courts of appeals have upheld

the admission of victim impact evidence from other sources. See United States v. Nelson, 347 F.3d 701, 712-13 (8th Cir. 2003); Bernard, 299 F.3d at 478; Allen, 247 F.3d at 779.

In addition to asking the Court to strike this factor, Pleau requests that the government provide him with an outline of its proposed victim impact evidence and with its proposed exhibits. Similar requests have been granted by other federal district courts. See, e.g., United States v. Rodriguez, 380 F. Supp. 2d 1041, 1056-58 (D.N.D. 2005); United States v. Bin Laden, 126 F. Supp. 2d 290, 304-05 (S.D.N.Y. 2001), aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93 (2d Cir. 2008). Moreover, in the present case, the government has agreed to produce the requested outlines for review. Accordingly, the Court hereby orders the government to provide an outline of its victim impact evidence by August 5, 2013, the date previously set for other pre-trial disclosures. (See Second Revised Case Management Order, ECF No. 257.) At that time, Pleau will have the opportunity to object to any particular area of victim impact evidence on the grounds that it is more prejudicial than probative. See 18 U.S.C. § 3593(c). The Court notes that federal courts have routinely allowed victim impact evidence, see, e.g., Nelson, 347 F.3d at 712-14; Chanthadara, 230 F.3d at 1273-74; United States v. McVeigh, 153

F.3d 1166, 1218-22 (10th Cir. 1998), but it will reserve ruling until objections are made.

4. Participation in other serious acts of violence

The next non-statutory aggravating factor alleges participation in other serious acts of violence. The first incident listed in support of this factor is an October 1996 burglary. The government does not allege that the burglary involved any violence or threat of violence against the person. Absent such an allegation, this incident is not sufficiently relevant to the determination of whether Pleau should live or die to be considered by the sentencing jury. See United States v. Concepcion Sablan, 555 F. Supp. 2d 1205, 1225 (D. Colo. 2007); United States v. Gilbert, 120 F. Supp. 2d 147, 155 (D. Mass. 2000).

By contrast, the October 1996 robberies are violent crimes of sufficient gravity to be considered at the sentencing phase. Pleau's young age when he committed the robberies does not render evidence relating to them inadmissible. See United States v. Rivera, 405 F. Supp. 2d 662, 669-70 (E.D. Va. 2005) (denying the defendant's motion to strike an aggravating factor alleging a "pattern of juvenile criminal activity"); United States v. Davis, No. CR.A. 01-282, 2003 WL 1873088, at *4-5 (E.D. La. Apr. 10, 2003) (holding that there is no per se rule barring the use of juvenile adjudications at the sentencing

phase of a capital case). Similarly, Pleau's argument that these crimes, which occurred fourteen years before the conduct giving rise to the pending charges, are too remote to be relevant is unpersuasive in light of the fact that Pleau was incarcerated for thirteen of those intervening years. See United States v. Henderson, 485 F. Supp. 2d 831, 869 (S.D. Ohio 2007) (rejecting the defendant's argument concerning the remoteness of his prior misconduct and noting that the defendant "spent a relatively short period of time outside of imprisonment . . . in the last twenty-five years"). The various hardships that Pleau was experiencing at the time also fail to justify striking the robberies. If this case proceeds to the sentencing phase and the government introduces evidence concerning these robberies, Pleau will have the opportunity to contextualize his prior conduct. See Davis, 2003 WL 1873088, at *6 (noting that "the defendant will be able to provide information on the social, economic, psychological, or emotional deprivations he suffered as a juvenile to rebut the juvenile delinquency adjudications"). Thus, evidence of the 1996 robberies is not more prejudicial than probative. See 18 U.S.C. § 3593(c).

Finally, federal courts have allowed the government to use past unadjudicated crimes to support non-statutory aggravators. See, e.g., United States v. Corley, 519 F.3d 716, 723-25 (7th Cir. 2008); United States v. Concepcion Sablan, 555 F. Supp. 2d

1177, 1192-95 (D. Colo. 2006); Gilbert, 120 F. Supp. 2d at 151. For this reason, the Court declines to strike Pleau's alleged August 2010 armed robbery of Chan's Restaurant.

In addition to moving to strike various aspects of this aggravating factor, Pleau requests complete discovery concerning the prior instances of alleged misconduct upon which the government intends to rely. In a capital case, federal prosecutors should "interpret their [discovery] obligations with respect to the penalty phase no differently than they would with respect to the guilt phase." See United States v. Karake, 370 F. Supp. 2d 275, 281 (D.D.C. 2005). Thus, the government must provide Pleau with full discovery, including any investigative materials relating to his March 2000 assault on a correctional officer. Pleau contends that the government should also be required to produce immediately a list of witnesses it expects to testify concerning Pleau's prior unadjudicated crimes. However, he fails to cite any authority for this proposition. Cf. Diaz, 2007 WL 2349286, at *4 (holding that the defendant was not entitled to the names of witnesses the government would use to support its grave risk of death aggravating factor). Accordingly, the government will not be required to produce a list of witnesses until the August 5, 2013 deadline that this Court has already set for disclosure of fact witness lists. (See Second Revised Case Management Order.)

5. Future dangerousness

The Supreme Court has held that a defendant's future dangerousness may constitutionally be considered by the sentencing jury in a capital case. See Jurek v. Texas, 428 U.S. 262, 274-76 (1976). The Court reached this result despite the defendant's argument that "it is impossible to predict future behavior." Id. at 274. Federal district courts, relying on this precedent, have rejected Pleau's argument that predictions of future dangerousness are so unreliable as to render consideration of this aggravator unconstitutional. See United States v. Wilson, No. 04-CR-1016 NGG, 2013 WL 563517, at *2-5 (E.D.N.Y. Feb. 15, 2013); United States v. Umana, 707 F. Supp. 2d 621, 634-35 (W.D.N.C. 2010). Similarly, courts have refused to categorically strike evidence of future dangerousness as more prejudicial than probative. See Wilson, 2013 WL 563517, at *5-7; United States v. Casey, CRIM. No. 05-277 (ADC), 2012 WL 6645702, at *2 (D.P.R. Dec. 20, 2012); Sablan, 555 F. Supp. 2d at 1181-84.[4] Pleau may, however, object to any particular aspect

[4] In support of his motion to strike this aggravator, Pleau cites United States v. Sampson, 335 F. Supp. 2d 166 (D. Mass. 2004). In that case, the district court submitted a future dangerousness aggravating factor to the jury, finding this decision "controlled by Jurek." Id. at 218. In dicta, the court, citing evidence of the unreliability of future dangerousness predictions, suggested "that it may now be appropriate for the Supreme Court to revisit Jurek." Id. While this Court shares the Sampson court's concerns, it also follows

of future dangerousness evidence pursuant to 18 U.S.C. § 3593(c), and the Court will consider, in connection with any particular opinion evidence (if any) to be offered on this point, the underlying basis for the witness's prediction in order to ensure its reliability consistent with the Court's gatekeeper role.

The government has agreed to limit the scope of the future dangerousness inquiry to dangerousness in the context of life imprisonment. While a sentence of less than life is theoretically possible in this case, see 18 U.S.C. § 924(j)(1), Pleau indicates his willingness to waive the right to argue for such a sentence in the event he is convicted. This does not, however, mean that the jury will be prohibited from considering Pleau's prior acts of violence outside prison. Such conduct is probative of Pleau's future dangerousness even while incarcerated. See Allen, 247 F.3d at 788-89; Sablan, 555 F. Supp. 2d at 1226; United States v. Hargrove, No. CRIM.A. 03-20192-CM, 2005 WL 2122310, at *7 (D. Kan. Aug. 25, 2005).

In addition to challenging the future dangerousness allegation generally, Pleau raises particularized challenges to each of the government's three sub-factors: (1) continuing pattern of violence; (2) low rehabilitative potential; and (3)

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that court's decision to uphold the future dangerousness aggravator.

lack of remorse. He argues that the continuing pattern of violence sub-factor impermissibly duplicates the other serious acts of violence aggravator. As a preliminary matter, the Supreme Court has expressly declined to pass on the constitutionality of duplicative aggravating factors. See Jones, 527 U.S. at 398. In any event, lower federal courts have held that aggravating factors alleging prior crimes and those alleging future dangerousness are not duplicative under the relevant standard. See Fields v. Gibson, 277 F.3d 1203, 1219 (10th Cir. 2002); Casey, 2012 WL 6645702, at *3; United States v. Wilson, 493 F. Supp. 2d 364, 391 (E.D.N.Y. 2006). Similarly, several federal district courts have held that the government's second sub-factor, low rehabilitative potential, may properly be alleged in support of a future dangerousness aggravator. See, e.g., Casey, 2012 WL 6645702, at *5; Bin Laden, 126 F. Supp. 2d at 303-04. Courts have also allowed sentencing juries to consider the government's third sub-factor, lack of remorse. See, e.g., Casey, 2012 WL 6645702, at *4-5; United States v. Roman, 371 F. Supp. 2d 36, 50 (D.P.R. 2005); Bin Laden, 126 F. Supp. 2d at 303-04; United States v. Edelin, 134 F. Supp. 2d 59, 79 (D.D.C. 2001).[5] The government indicates that it will not

[5] In support of his argument that the Court should strike the lack of remorse sub-factor, Pleau cites Pope v. State, 441 So. 2d 1073 (Fla. 1983). There, the Supreme Court of Florida held that "lack of remorse should have no place in the

rely on Pleau's silence or his decision not to plead guilty to prove this sub-factor. Rather, it alleges that Pleau's lack of remorse is "indicated by his actions following the killings [sic], and his statements to his accomplices and to law enforcement agents." (Notice of Intent 5.) The evidence described in the government's memorandum, if proved, is sufficient to support a finding of lack of remorse. Moreover, the memorandum provides Pleau with notice concerning the words and actions upon which the government intends to rely to prove this sub-factor, and he may prepare his mitigation case accordingly.

The government has agreed to provide, by May 20, 2013, bills of particulars specifying: (1) the crimes or other acts of violence on which it will rely in support of the continuing pattern of violence sub-factor; (2) the other criminal offenses it will seek to establish that Pleau committed while on parole; and (3) the disciplinary infractions that it will seek to prove. With respect to the third item, the government should be aware of the fact that not all disciplinary infractions are sufficiently serious to be relevant to the capital sentencing decision. Indeed, mere "threatening words" directed at correctional officers are not probative of future dangerousness.

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consideration of aggravating factors." Id. at 1078. However, this decision is unpersuasive to the extent it conflicts with the clear consensus of federal courts.

See Sablan, 555 F. Supp. 2d at 1234, 1236-37; Davis, 912 F. Supp. at 945 ("Threatening words and warped bravado, without affirmative acts, are simply too slippery to weigh as indicators of character; too attenuated to be relevant in deciding life or death."). Additionally, the Court orders the government, by May 20, 2013, to provide a bill of particulars listing the incidents upon which it intends to rely in proving the second non-statutory aggravating factor, participation in other serious acts of violence.

6. Pre-trial review of the government's evidence

Finally, Pleau asks that the Court hold a hearing or require a proffer to assess the sufficiency and reliability of the government's evidence in support of its aggravating factors. Other federal district courts have required the government to proffer its penalty phase evidence. See, e.g., United States v. Sampson, 335 F. Supp. 2d 166, 188, 224 (D. Mass. 2004) (explaining that the court ordered the government to proffer its evidence supporting the aggravating factors of victim impact and future dangerousness); Edelin, 134 F. Supp. 2d at 75 (denying the defendant's motion for an evidentiary hearing and noting that "[t]he Court has ordered the government to make a proffer of the information it will produce at the time of sentencing"). Here, the Court finds that such a proffer is unnecessary with respect to the statutory aggravating factors. See, e.g., United

States v. Johnson, No. CR 01-3046-MWB, 2013 WL 163463, at *21-25 (N.D. Iowa Jan. 16, 2013) (finding pre-trial review of the government's penalty phase evidence "unnecessary"). Because it appears that much of the evidence supporting these factors will be admitted at the guilt phase, the Court will have ample opportunity to review that evidence before the sentencing hearing even begins. Similarly, no proffer is necessary with respect to the government's victim impact evidence in light of the fact that the Court has already required the government to produce an outline of that evidence.

On the other hand, the Court finds that a proffer is necessary with respect to the last two non-statutory aggravating factors, namely participation in other serious acts of violence and future dangerousness. Both aggravators rely heavily on Pleau's past misconduct. In describing these crimes, the government's memorandum refers to police reports and witness statements. The FDPA explicitly provides that the Federal Rules of Evidence do not apply in capital sentencing hearings. See 18 U.S.C. § 3593(c). The Supreme Court has, however, emphasized the need for heightened reliability in such proceedings. See Ford v. Wainwright, 477 U.S. 399, 411 (1986). Accordingly, federal district courts have required the government to prove aggravating factors without relying on hearsay evidence. See Sampson, 335 F. Supp. 2d at 224 (excluding incidents of the

defendant's prison misconduct because they "could not have been established by reliable evidence, such as live testimony"); United States v. O'Driscoll, 250 F. Supp. 2d 432, 436 (M.D. Pa. 2002) ("[W]here the government attempts to use unadjudicated acts of violence and misconduct the heightened standard of reliability applicable to capital sentencing proceedings requires that the hearsay rule be fully applicable to the penalty phase proceeding."); Davis, 912 F. Supp. at 946 n.20 (requiring that the government prove the defendant's prior misconduct "by direct evidence"); see also Sablan, 555 F. Supp. 2d at 1221-22 (holding that the Confrontation Clause applies to proof of aggravating factors). While the Court, at this point in the litigation, takes no position on the applicability of the rule against hearsay or the Confrontation Clause at the sentencing phase of the trial, it does need to know whether it will ultimately have to address these issues. For that reason, the Court hereby orders the government to proffer its evidence in support of the last two aggravating factors by August 5, 2013. The government's proffer shall include lists of the witnesses it expects to testify in support of each aggravator, brief descriptions of each witness's anticipated testimony, and copies of any out of court documents or exhibits that the government plans to introduce.

III. Conclusion

For the foregoing reasons, Defendant's motion to dismiss is DENIED. His motion to strike is GRANTED with respect to the October 1996 burglary and DENIED with respect to the remainder of the government's notice of intent. Pleau's request for "other relief" is GRANTED insofar as the Court hereby orders the government to: (1) provide an outline of its victim impact evidence by August 5, 2013; (2) provide the bills of particulars described above by May 20, 2013; and (3) proffer its evidence supporting the participation in other serious acts of violence and future dangerousness aggravators by August 5, 2013.

IT IS SO ORDERED.

/s/ William E. Smith
William E. Smith
United States District Judge
Date: April 17, 2013